

DRAFT Administrative Regulations

Virginia Administrative Code

CHAPTER 10

PUBLIC PARTICIPATION GUIDELINES

7VAC10-10-10 Policy.

The department shall adopt regulations to implement certification programs for small, women- and minority-owned businesses, which regulations are exempt by statute from the Administrative Process Act (§2.2-4000 et seq.) pursuant to subdivision B 2 of § 2.2-4002. The department, however, may seek public participation from interested parties prior to formation and during the drafting, promulgation and final adoption process of regulations.

DRAFT Administrative Regulations

Virginia Administrative Code

CHAPTER 20

REGULATIONS TO GOVERN THE CERTIFICATION OF SMALL, WOMEN- AND MINORITY-OWNED BUSINESSES

Part I

General Information

7VAC10-20-10 Purpose.

The purpose of this Chapter is to establish minimum requirements for the certification of small, women- and minority-owned businesses pursuant to §§ 2.2-1400 et seq. of the *Code of Virginia* and to provide a process for evaluating existing local, state, private sector, and federal certification programs that meet the minimum requirements pursuant to § 2.2.-1403.8. of the *Code of Virginia*.

The Director of the department shall be the final authority on all matters pertaining to the maintenance and administration of certification programs and compliance therewith, excepting judicial review process provided in Part VII of the regulations and pursuant to the Virginia Administrative Process Act.

7VAC10-20-20 Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context requires a different meaning:

"Administratively closed" means an application for certification or recertification that was placed in an inactive status by the department due to:

- (A) Insufficient information submitted or the failure of the Applicant to respond to at least one (1) written request for information;
- (B) The Applicant has voluntarily withdrawn his application; or
- (C) The firm is no longer in business.

"Affiliate" means a person effectively controlled by another person or under common control with a third person. A branch, division, or subsidiary. Under the Investment Company Act (15 USCA Section 8a-2), a company in which there is ownership (direct or indirect) of five percent (5%) or more of the voting stock.

"Agent" means a person authorized to act on behalf of the principal in involving a third party. Agents have three basic characteristics:

- i) They act on behalf of and are subject to the control of the principal;
- ii) They do not have title to the principal's property; and
- iii) They own the duty of obedience to the principal's orders.

Agents by their nature are not certifiable.

DRAFT Administrative Regulations

“Appeal” means a written request by an applicant to reconsider a determination of denial of certification.

"Applicant" means any business that applies to the department for certification as a bona fide Small, Women- or Minority-owned Business under the Code of Virginia § 2.2-1401.

“Application” means the application form submitted under penalty of perjury and all requested documentation, and the report of the on-site visit, if one was conducted by the department, upon which the department will base its decision to grant or deny certification or recertification.

“Broker” means a person, who acts as an intermediary between a buyer or seller, usually charging a commission for value added. A business that adds no material value or does not perform a commercially useful function to the products or services being supplied to a procuring activity or takes no ownership, financial responsibility, legal liability, possession of or handle the item being procured with its own equipment or facilities will not be certifiable, unless it’s the standard in the industry.

"Business" means a legal entity, which is organized in any form, such as a sole proprietorship, partnership, corporation, limited liability partnership or company or joint-venture, to engage in lawful commercial transactions for profit.

“Certification” means the process by which a business is determined to be a small, women- or minority-owned business for the purpose of reporting small, women-owned and minority-owned business participation in state contracts and purchases pursuant to §§2.2-1404 and 2.2.-1405 of the *Code of Virginia*.

"Certification staff" means the staff of the department assigned to review all matters related to applications for certification, recertification and decertification at the direction of the Director of the department.

"Certified" means that an Applicant has satisfied the requirements of this chapter as a Small, Women- or Minority-owned business and is placed on the department's certified vendors list for a period of three (3) years.

“Certified Supplier List” means a listing containing the names of currently certified small, women- and minority-owned businesses maintained by the department.

“Challenge” means a formal filing by a third party questioning the eligibility of a certified business.

“Contract Compliance” means the enforcement of appropriate use of certification in purchasing and contracting activities.

“Consultant” means one who that gives expert or professional advice for fee or commission.

DRAFT Administrative Regulations

“Control” means the power to direct the operation and management of a business.

“Corporation” means a specific type of legal entity that is in compliance with the applicable requirements of the law of its state of incorporation.

"Day" means any day except Saturday, Sunday, and legal state holidays.

“Dealership” means the authorization to sell specified items in a certain area with or without exclusivity.

"Decertification" means the process by which the department determines that a business no longer meets the eligibility requirements and rescinds its certification.

“Denial” means the decision by the department to deny certification to a business that does not meet the applicable certification eligibility criteria specified in these regulations.

"Department" or "DMBE" means the Department of Minority Business Enterprise.

"Director" means the Director of the Department of Minority Business Enterprise or his/her designee.

“Distributor” means one that markets or sells merchandise, i.e. a wholesaler.

“Document Review” means the department’s review of the application and accompanying documentation submitted by an applicant.

“Expiration” means the specified end of the certification period.

“Financial Institution” means a bank, trust company or other financial institution authorized by law to carry on a trust business.

“Financial Review” means the review of financial records of an applicant.

“Franchise” means a contractual arrangement characterized by the authorization granted to someone to sell or distribute a company’s goods or services in a certain area; a business or group of businesses established or operated under such authorization.

“Industry Standard or Standard in the Industry” means the usual and customary practices in the delivery of products or services within a particular business sector, i.e. mortgage brokers, insurance broker, securities brokers.

“Joint venture” means a one-time association of 2 or more persons or businesses, the purpose of which is to carry out a time limited single business enterprise for profit in which they combine their property, capital, efforts, skills and knowledge, and in which they exercise control and management and share in profits and losses in proportion to their contribution to the business enterprise.

DRAFT Administrative Regulations

“Joint venture agreement” means a written agreement signed by each joint venturer specifying the terms and conditions of the joint venture.

“Limited Liability Company” means a specific type of legal entity that is in compliance with the applicable requirements of the law of its state of formation.

“Manufacturer Representative” means a person that represents another for or to others, i.e. manufacturer’s group. Typically Manufacturer Representatives are not certifiable.

“Minority Individual(s)” means an individual(s) who is a citizen of the United States or a non-citizen who is in full compliance with United States immigration law and who satisfies one or more of the following definitions:

- i) “African American” means a person having origins in any of the original peoples of Africa and who is regarded as such by the community of which this person claims to be a part.
- ii) “Asian American” means a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands, including but not limited to Japan, China, Vietnam, Samoa, Laos, Cambodia, Taiwan, Northern Mariana, the Philippines, a U.S. territory of the Pacific, India, Pakistan, Bangladesh, Sri Lanka and who is regarded as such by the community of which this person claims to be part.
- iii) “Hispanic American” means a person having origins in any of the Spanish-speaking peoples of Mexico, South or Central America, or the Caribbean Islands or other Spanish or Portuguese cultures and who is regarded as such by the community of which this person claims to be part.
- iv) “Native American” means a person having origins in any of the original peoples of North America and who is regarded as such by the community of which this person claims to be part or who is recognized by a tribal organization.

“On-Site Review” means a visit to the applicant’s physical place(s) of business for the verification of information submitted in the application and accompanying documentation.

“Ownership” means a determination based on title to and beneficial ownership of stock, membership interests, or other equity in a business.

“Person” means any individual, partnership, joint venture, firm, corporation, limited liability company, trust, or other enterprise.

“Principal Place of Business” means the business location where individuals who manage the business’s day-to-day operations spend most working hours and where top management business records are kept.

DRAFT Administrative Regulations

“Partnership” means an association of two or more persons to carry on, as co-owners, a business for profit.

“Recertification” means the process by which a business renews its certification prior to expiration.

“Regular Dealer” means a business that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies are bought, kept in stock, and regularly sold to the public in the usual course of business.

“Reseller” means the act of selling a second time or distributing goods in commerce. The act of selling used or new products for profit. A business entity that resells.

“Retailer” means the seller of goods or commodities directly to the consumers at a retail price.

“Sole Proprietorship” means an individually owned business whose assets are wholly owned by a single individual.

“Strategic Alliance” means an association, not a legal entity, of two or more separate businesses that come together to pursue business opportunities.

“Subsidiary” means an entity in which another entity (i.e. the parent) owns at least a majority of the shares, and thus has control. For example, a corporation more than fifty percent (50%) of whose voting stock is owned by another.

“Value Added” means something that is added to a product or service by a marketer or distributor that warrants a markup in the retail price.

“Virginia-based business” means a business which is incorporated in or has its principal place of business in Virginia.

“Withdrawal of Application” means a written request by a business to withdraw its application for certification without cause, prior to the certification determination.

“Wholesaler “ means an intermediary or distributor who sells mainly to retailers, other merchants, and industrial commercial and institutional users as distinguished from consumers.

7VAC10-20-30 Confidentiality.

The department shall take necessary steps to ensure the confidentiality of documents submitted in support of an application for certification, which are not public records within the definition of the Freedom of Information Act, §2.2-3700 et seq. of the *Code of Virginia*.

DRAFT Administrative Regulations

Any financial records of a business, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise, or trade secrets as defined in the Uniform Trade Secrets Act (§59.1-336 *et seq.* of the *Code of Virginia*), provided to the department as part of any application for certification as a small, women-, or minority-owned business enterprise, or a claim made by a disadvantaged business, shall be excluded from the provisions of the Freedom of Information Act pursuant to §2.2-3705.6 of the *Code of Virginia*, but may be disclosed by the custodian in his discretion where such disclosure is not prohibited by law.

In order for such financial records or trade secrets to be excluded from the Freedom of Information Act, the business shall: (a) invoke such exclusion upon submission of data or other materials for which protection from disclosure is sought; (b) identify the data or other materials for which protection is sought; and (c) state the reason why protection is necessary.

7VAC10-20-40 False or misleading information.

Any Applicant that knowingly provides false or misleading information on its application for certification or recertification or in its supporting documentation shall be denied certification and shall not be permitted to reapply for certification.

In addition, the Applicant may be referred to the Commonwealth's Attorney for the City of Richmond for possible criminal prosecution for a misdemeanor or a felony under § 18.2-213.1 or §18.2-498.3 *Code of Virginia*.

Part II

Minimum Eligibility Standards

7VAC10-20-100 Eligible Small Business

A business may be certified as a small business if:

- i) it is independently owned and operated by one or more persons who are U.S. citizens or legal resident aliens; and
- ii) together with its affiliates, it has 250 or fewer employees, or average gross receipts of \$10 million or less averaged over the previous three years.

7VAC10-20-110 Eligible Women-owned Business

A business may be certified as a women-owned business if:

- i) it is at least 51% owned by one or more women who are U.S. citizens or non-citizens in full compliance with U.S. immigration law; or
- ii) in the case of a corporation, partnership or limited liability company or other entity, at least 51% of the equity ownership interest is owned by one or more

DRAFT Administrative Regulations

women who are U.S. citizens or non-citizens in full compliance with U.S. immigration law; and

iii) one or more women who are U.S. citizens or non-citizens in full compliance with U.S. immigration law control both the management and daily business operations.

7VAC10-20-120 Eligible Minority-owned Business

A. A business may be certified as a minority-owned business if:

i) it is at least 51% owned by one or more minority individuals; or

ii) in the case of a corporation, partnership or limited liability company or other entity, at least 51% of the equity ownership interest in the corporation, partnership or limited liability company or entity is owned by one or more minority individuals; and

iii) both the management and daily business operations are controlled by one or more minority individuals; and

iv) the minority individual is regarded as such by the community of which the person claims to be a part.

B. Being born in a country does not, by itself, define an individual as a minority individual pursuant to § 2.2-1401 of the *Code of Virginia*. In making the determination whether a person is a minority individual, the department is required to determine whether the person is “regarded as” a minority individual by “the community of which he or she claims to be a part.” In making this determination, the department may consider whether:

i) the person regularly describes himself or herself, in printed materials and orally, as a member of the community;

ii) whether the person historically has held himself or herself out as a member of the community;

iii) whether the individual is a member of and actively participates in business, educational, charitable, civic or community organizations or activities made up of or traditionally identified with or attended by members of the community; and

iv) whether other members of the community describe the person as a fellow member of the community.

The department may request such additional information, as it may reasonably need to support an individual’s claim that he or she is a minority Individual. In determining whether a minority individual is regarded as such by the community, the department shall consider all the facts in the record, viewed as a whole.

DRAFT Administrative Regulations

7VAC10-20-130 Eligible Disadvantaged Business Enterprise.

A business may be certified as a disadvantaged business enterprise, as defined in 49 CFR Parts 23 and 26, Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs, if:

ii) it is at least 51% owned by one or more socially and economically disadvantaged individuals; or

iii) in the case of any corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership is owned by one or more socially or economically disadvantaged individuals; and

iii) the management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it; and

iv) it meets the size standards of 13 CFR Part 121.2 and relevant regulations promulgated thereto.

7VAC10-20-140 Eligible Out of State Business Enterprise.

The department may certify a non-Virginia based business if:

i) it meets the applicable eligibility standards for certification as a small, women- or minority-owned business; and

ii) the state in which the business is incorporated or has its principal place of business does not deny a like certification to a Virginia-based small, women- or minority-owned business or provide a preference to small, women- or minority-owned firms that is not available to Virginia-based businesses.

Part III

Determination of Ownership and Control of Women- and Minority-Owned Businesses.

7VAC10-20-200 General Provisions.

1. The department will apply the following standards and procedures in determining whether an applicant business is owned and controlled by a woman or women or by a minority individual or individuals as required by law.

2. The department will consider all the facts in the record, viewed as a whole, as they appear at the time of the application.

3. An eligible applicant will not be refused certification based solely on historical information indicating a lack of ownership or control of the applicant by a woman or women or by a minority individual or individuals at some time in the past, if the

DRAFT Administrative Regulations

applicant meets the ownership and control standards at the time of application. A business will not be certified, however, if it appears from the record that the ownership structure or control of the business was changed for the purpose of qualifying for certification as a small, women- or minority-owned business.

4. An eligible applicant will not be refused certification solely on the basis that it is a newly formed business.

7VAC10-20-210 Ownership.

1. The ownership by women or minority individuals must be real, substantial and continuing going beyond the pro-forma ownership of the business as reflected in its ownership documents.

2. The applicant must share in all risk and profits commensurate with his or her ownership interest as demonstrated by a detailed examination of the substance of her business arrangements with others.

3. All securities that constitute ownership of a business shall be held directly by the woman or women or by the minority individual or individuals or held in a trust that is one of the types of trusts described below.

4. Contribution of Capital or Expertise:

a. Contribution of capital and/or expertise by women or minority individuals to acquire their ownership interest shall be real and substantial and be in proportion to the interest(s) acquired.

b. Insufficient contributions shall include, but shall not be limited to promises to contribute capital or expertise in the future, a note payable to the business or its owners who are not women or minority individuals, or the mere participation as an employee.

5. Business Structures and ownership vehicles. Legal entities must be formed in and have their principal place of business in the United States or one of its territories.

a. Sole Proprietor

i.) In a sole proprietorship, the woman or minority individual applying for certification must own one hundred percent (100%) of the company assets.

b. Corporation

i.) In a corporate form of organization, women or minority individuals who are principal(s) must own at least fifty-one percent (51%) of each class of voting stock outstanding and fifty-one percent (51%) of the aggregate of all stock outstanding.

DRAFT Administrative Regulations

- ii.) Any voting agreements among the shareholders must not dilute the beneficial ownership, the rights, or the influence of the women or minority individuals who are owners of the stock or classes of stock of the corporation.
- iii.) Women or minority individuals who are owners shall possess the right to all customary incidents of ownership (e.g., ability to transfer stock, title possession, enter binding agreements, etc.).
- iv.) Nonprofit corporations do not meet this requirement and are therefore not eligible for certification.

c. Partnerships

i.) General Partnership. In a general partnership, women or minority individuals who are owners must own at least fifty-one percent (51%) of the partnership interests.

ii.) Limited Partnership

1. In a limited partnership, the women or minority individuals who are general partners must own at least fifty-one percent (51%) of the general partnership interest and exert at least fifty-one percent (51%) of the control among general partners. The women or minority individuals who are general partners must receive at least fifty-one percent (51%) of the profits and benefits, including tax credits, deductions and postponements distributed or allocable to the general partner.

2. In addition, the women or minority individuals who are limited partners must own at least fifty-one percent (51%) of the limited partnership interests and receive at least fifty-one percent (51%) of the profits and benefits, including tax credits, deductions and postponements distributed or allocable to the limited partners.

d. Limited Liability Companies

i. In a limited liability company, women or minority individuals who are principal(s) must own at least fifty-one percent (51%) of membership interests, and at least fifty-one percent (51%) of the management and control among the members.

ii. The women or minority individuals who are principals must also participate in all risks and profits of the organization at a rate commensurate with their membership interests.

e. Trusts

In order to be counted as owned by women or minority individuals, securities held in a trust must meet the following requirements, as applicable:

1. *Irrevocable trusts.* The beneficial owner of securities held in an irrevocable trust is a woman or minority individual who is not a minor, and all the trustees are women or minority individuals, provided that, a financial institution may act as trustee.

2. *Revocable trusts.* The beneficial owner of securities held in a revocable trust is a woman or minority individual who is not a minor, all the grantors are women or minority individuals and all the trustees are women or minority individuals, provided that, a financial institution may act as trustee.

DRAFT Administrative Regulations

3. *ESOPs*. Securities owned by women or minority individuals who are participants in an employee stock ownership plan qualified under Section 401 of the Internal Revenue Code, 1986, as amended, and held in a trust where all of the trustees are women or minority individuals, provided that, a financial institution may act as trustee.

4. *Other requirements*. Businesses whose securities are owned in whole or part in a trust are not thereby exempt from the other requirements of this chapter.

f. Joint Venture

In a joint venture the women or minority individuals must own at least fifty-one percent (51%) of the business venture, exert at least fifty-one (51%) of the control of the venture, and have made at least fifty-one percent (51%) of the total investment.

7VAC10-20-220 Control

The applicant must show evidence that the woman/women owner(s) or the minority individuals who are owners have control of the business.

“Control” means the primary power to direct the management of a business enterprise as evidenced through the governance documents and actual day-to-day operation.

The following factors will be examined in determining who controls an applicant business:

1. Governance

a. The organizational and governing documents of an applicant (e.g. Limited Liability Company Operating Agreements, Partnership Agreements, or Articles of Incorporation and By-laws) must not contain any provision, which restricts the ability of the woman/women or minority individuals who are business owner(s) from exercising managerial control and operational authority of the business.

b. In reviewing governance documents and issues, special attention shall be given to:

i. The composition of the business’s governing body (e.g., board of directors or management committee);

ii. The functioning of the governing body;

iii. The content of shareholder’s agreements, bylaws, or state incorporation statutes, and the extent to which such agreements, bylaw(s), or statutes affect the ability of the woman/women or minority individual owner(s) to direct the management and policy of the business;

iv. A woman or minority individual business owner must hold the highest officer position in the company (i.e. President or Chief Executive Officer by whatever title).

2. Operation and Management

DRAFT Administrative Regulations

- a. The woman/women or minority individual owner(s) must possess the power to direct or cause the direction of the management and policies of the business and to make the day-to-day as well as major decisions on matters of management, policy and operations. The business must not be subject to any formal or informal restrictions that limit the customary discretion of the woman/women or minority individual business owner(s).
- b. A previous and/or continuing employer-employee relationship between or among present owners are carefully reviewed to ensure that the female or minority individual employee-owner has management responsibilities and capabilities.
- c. In the event that the actual management of the business is contracted or carried out by individuals other than the woman/women or minority individual owner(s), those persons who have the ultimate power and expertise to hire and fire the managers can, for this purpose, be considered as controlling the business.
- d. The woman or minority individual owner or another such women or minority individual must hold the highest officer position in the company (i.e. Chief Executive Officer or President by whatever title).
- e. The applicants must show evidence that the woman/women or minority individual owner(s) have operational authority and managerial control of the applicant. In evaluating this evidence, the following factors will be considered:

i.) Operational Authority. "Operational Authority" means the extent to which the woman/women or minority individual owner(s) actually operate the day-to-day business. Assessments of operational control will rest upon the peculiarities of the industry of which the business is a part. In order to ascertain the level of operational control of the woman/women or minority individual owner(s), the following will be considered:

- 1. Experience: The woman/women or minority individual owner(s) shall have education, demonstrable working knowledge and/or experience in the area of specialty or industry claimed in the certification application.
- 2. Responsibility for Decision-Making: The woman/women or minority individual owner(s) shall be able to demonstrate his or her role in making basic decisions pertaining to the daily operation of the business.
- 3. Technical Competence: The woman/women or minority individual owner(s) shall have technical competence in the industry or specialty of the applicant business and/or a working knowledge of the technical requirements of the business sufficient enough to critically evaluate the work of subordinates.

ii.) Managerial Control. "Managerial Control" is the demonstrated ability to make independent and unilateral business decisions necessary to guide the future and destiny of the business. Managerial control may be demonstrated in a number of ways. For a woman/women or minority

DRAFT Administrative Regulations

individual owner(s) to demonstrate the extent of his or her managerial control, the department will consider the following (not intended to be all inclusive) areas of routine business activity:

1. The woman/women or minority individual owner(s) must produce documents that clearly indicate his or her control of basic business functions, e.g., authority to sign payroll checks and letters of credit, signature responsibility for insurance and/or bonds, authority to negotiate contracts and financial services.

2. Agreements for support services that do not impair the woman/women or minority individual owner(s)'s control of the company are permitted as long as the owner's power to manage the company is not restricted or impaired as determined by the department in its sole administrative discretion.

3. Independence

- a. Performance

- i.) The woman/women or minority individual owner(s)'s expertise must be indispensable to the business's potential success.

- ii.) The woman/women or minority individual owner(s) shall have the ability to perform in its area of specialty/expertise without substantial reliance upon finances and resources (e.g., equipment, automobiles, facilities, etc.) of males or non-woman business enterprises or of non-minority business enterprises.

- b. Test of Independence. Recognition of the applicant as a separate and distinct entity by governmental taxing authorities shall not be a sole determinant of any applicant's assertions of independence. Test criteria include, but are not be limited to the following:

- i. Applicant's relationship with a non-female or non-minority company that involves any long-term contract or lease agreements.

- ii. Applicant's status as a party to any contract or lease agreement on terms at variance with industry standards or prudent business practices.

- iii. Interlocking ownership of the applicant and non-woman or non-minority business enterprise in the same industry.

- iv. Common directors/officers/members between the applicant and non-woman or non-minority business enterprises.

- v. Applicant's use of employees, equipment, expertise, facilities, etc., "shared" with or obtained from a non-woman or non-minority owned company.

- vi. The receipt by the non-women or non-minority of financial benefits (i.e. profits, wages, etc.) shall be commensurate with the duties performed.

- vii. An applicant's business that cannot operate without licenses, permits and/or insurance held by another business

DRAFT Administrative Regulations

is not independent. The business must possess all legal requirements necessary to legally conduct business.

viii. A broker, dealer, or manufacturers representative, unless it is the standard for the industry, generally does not qualify for certification.

7VAC10-20-230 Certifying Franchises.

1. A business operating under a franchise or license agreement may be certified if it meets the eligibility requirements and:

1. The franchise agreement between the franchisor and the franchisee seeking certification must not contain any provision which unreasonably restricts the ability of the woman business or minority individual owner(s) from exercising Managerial Control and Operational Authority of the business.

2. In reviewing the franchise agreement, special attention shall be given to circumstances which, for certification purposes, shall be considered as restricting control and authority of the woman or minority individual business owner(s). These include, but are not limited to:

- a. termination of the franchise agreement by the franchisor without cause;
- b. lack of ownership of receivables by the franchisee;
- c. exclusive ownership of account receivables and/or contracts by the franchisor;
- d. restrictions on the sale of the business below market value;
- e. terms and conditions not related to the brand or systems can be altered without franchisee's notification and/or approval;
- f. contracts are prepared and approved by the franchisor;
- g. management decisions cannot be made independently by the franchisee;
- h. no financial risk is borne by the franchisee;
- i. hiring and firing decisions cannot be made independently by the franchisee; or
- j. equity interest in the franchise is owned by the franchisor.

3. Where there are inconsistencies between the standards and procedures in this section and other sections of regulations, this section will prevail.

Part IV

Certification and Recertification Procedures

7VAC10-20-300 General Provisions.

1. Applications for certification or recertification and other forms are available from and should be submitted to: Virginia Department of Minority Business Enterprise, 1111 East Main Street, Suite 300, Richmond, Virginia 23219 or through the department's website if available.

2. A business may withdraw its application for certification or recertification, without prejudice, at any time prior to the department's determination. The request to withdraw the application must be in writing.

DRAFT Administrative Regulations

3. The department shall maintain a list of all certified businesses on its website and in print. This list shall be used as a source to assist governmental agencies, individuals, corporations, and prime contractors in identifying and utilizing certified businesses. This list shall be updated and published on a consistent basis.

7VAC10-20-310 Procedures for Initial Certification of Businesses Previously Certified by Other Qualifying Local, State, Private Sector, or Federal Certification Programs.

1. A Virginia-based business, which has been certified as a small, women- or minority-owned business by a local, state, private sector or federal certification program determined by the department pursuant to Part V of this chapter to meet the minimum eligibility, ownership and control requirements, shall be certified as a small, women- or minority-owned business in Virginia, without additional paperwork or fee, upon presentation to the department of documentation that the business has received such certification, the certification has not expired and ownership and control of the applicant business remains unchanged since the certification was granted.

2. A business that is not based in Virginia, which has been certified as a small, women- or minority-owned business by a local, state, private sector or federal certification program determined by the department pursuant to Part V of this chapter to meet the minimum eligibility, ownership and control requirements, shall be certified as a small, women- or minority-owned business in Virginia, without additional paperwork or fee, upon presentation to the department of documentation that it has received such certification, the certification has not expired and ownership and control of the applicant business remains unchanged since the certification was granted if the department determines that such certification would be available to Virginia-based businesses in the state in which the business is incorporated or has its principle place of business.

3. A business certified by the department under this section shall be certified for a period of three (3) years, unless the business is decertified by the department or the program issuing the original certification or the business is no longer in business or the ownership or control of the business changes.

4. A business certified under this section is be responsible for notifying the department immediately of any change in legal structure, ownership, control, management, or status of the business or its certification within thirty (30) days of such change. Failure to do so may be grounds for revocation of certification.

5. It shall be the responsibility of the certified business to notify the department of any change of name and/or address and/or contact information and to keep the department informed of their current address and/or contact information. Changes of name and address must be reported to the department in writing within 30 calendar days of such change. Failure to do so within 30 days of such change may be grounds for decertification. The department shall not be

DRAFT Administrative Regulations

responsible if a certified business fails to receive notices, communications and/or correspondence based upon the certified business' failure to notify the department of any change of address and/or to provide correct address and/or contact information.

7VAC10-20-320 Procedures for Initial Certification of Businesses Not Previously Certified by Other Qualifying Local, State, Private Sector, or Federal Certification Programs.

1. Any business that meets the criteria for certification may file an official application with the department.
2. The application will be reviewed initially for completeness. The department may conduct a site visit of the business to obtain or clarify any information, which site visit may be scheduled or unannounced.
3. The department may request the applicant to provide additional information or documentation to provide clarification and substantiation of certain criteria or to resolve any ambiguities or inconsistencies in an application.
4. The department may impose a time limit of not less than thirty (30) days in which the applicant must provide the requested information. A reasonable extension may be given by the department for good cause shown by the applicant. Requests for time extensions must be made to the department in writing, and should specify the length of time for which the extension is being requested, and the reasons for the request. Failure to provide such information or documentation shall render the application administratively closed.
5. After reviewing the application, the department shall issue either a notice of certification or a notice of intent to deny certification stating the reasons for denial and offering the applicant the opportunity for an informal hearing.
6. A business certified by the department under this section shall be certified for a period of three (3) years, unless the business is decertified or is no longer in business or the ownership or control of the business changes.
7. The applicant shall be responsible for notifying the department immediately of any change in legal structure, ownership, control, management, or status of the business within thirty (30) days of such change. Failure to do so may be grounds for revocation of certification.
8. It shall be the responsibility of the applicant and/or the certified business to notify the department of any change of name and/or address and/or contact information and to keep the department informed of their current address and/or contact information. Changes of name and address must be reported to the department in writing within 30 calendar days of such change. Failure to do so within 30 days of such change may be grounds for decertification. The department shall not be responsible if a certified business fails to receive notices, communications and/or correspondence based upon the certified business'

DRAFT Administrative Regulations

failure to notify the department of any change of address and/or to provide correct address and/or contact information.

7VAC10-20-330 Procedures for renewal of certification or recertification.

1. To maintain its certification status, a business must renew its certification using the forms specified by the department prior to the designated expiration date. Failure to do so may result in decertification.
2. The department shall notify the business of its pending expiration at least 60 days prior to the expiration date of its certification.

Part V

Evaluation of Local, State, Private Sector and Federal Certification Programs

7VAC10-20-400 Department Initiated Evaluation.

The department may in its discretion evaluate any other local, state, private sector or federal certification program to determine whether it meets the minimum eligibility, ownership and control requirements for certification of small, women- and minority-owned businesses as set forth in this chapter.

7VAC10-20-410 Application for Evaluation by Business or Program.

The department shall evaluate any such program upon the application (on a form or forms provided by the department for such evaluation) by an individual business or a representative of the certification program.

7VAC10-20-430 Standards for Evaluation Other Certification Programs.

In conducting its evaluation of other certification programs, the department will determine:

- i) whether the minimum eligibility, ownership, and control requirements for certification are equivalent to or stricter than those set forth in this chapter;
- ii) whether the program provides for a process for reviewing applications for certification that requires adequate documentation that the applicant meets the standards for certification;
- iii) whether the program has a fair process for reviewing the application for certification (that may include a site visit); and
- iv) whether the program provides an opportunity for an applicant to appeal a denial of certification.

7VAC10-20-440 Department to Maintain List of Other Certification Programs.

The department shall maintain on its website and in print form a list of all local, state, private sector and federal certification programs that it has determined

DRAFT Administrative Regulations

meet the minimum eligibility, ownership and control requirements for certification set forth in this chapter.

Part VI

Denial of Certification or Decertification

7VAC10-20-500 Denial of certification.

The department shall deny certification for any of the following reasons:

1. The department determines that the applicant fails to meet the eligibility, ownership, or control standards for certification.
2. The applicant fails to furnish the department with requested information within the allotted time.
3. The applicant knowingly provides false or misleading information to the department.

7VAC10-20-510 Notice of denial.

The department shall notify the applicant of its certification denial by in writing no later than fifteen (15) days from the date of the decision by the department stating the reasons for the denial and offering the applicant the opportunity to appeal the decision.

7VAC10-20-520 Decertification criteria.

The department may decertify a business which it finds no longer qualifies as a small, women- or minority-owned business under § 2.2-1401 of the *Code of Virginia*.

Grounds for decertification may include the following:

- i) The status of the business has changed to the extent that it no longer satisfies the requirement of ownership, control and active management of the business.
- ii) The business fails to submit an application for recertification within the allotted time.
- iii) The business fails to submit the required documentation or comply with a reasonable request from the department for records or information within the allotted time.
- iv) The business knowingly provides false or misleading information in support of its application or renewal application or in response to the department's request for records or information.

7VAC10-20-530 Decertification procedure.

1. Initiation of decertification process.

DRAFT Administrative Regulations

A. The department may, at the request of any state agency or at its own discretion, examine any certified business to verify that it qualifies for certification.

B. Any individual or firm who believes that a business certified by the department does not qualify under the standards of eligibility for certification may request a decertification investigation by the department. Such requests must be written and signed and must contain specific identification of the affected business, and the basis for the belief that it does not meet the eligibility standards. After reviewing the request, the department shall determine whether to conduct a review of the business or to allow the certification to stand. The department's decision may not be appealed. Written requests for decertification investigations should be sent to the Virginia Department of Minority Business Enterprise, 1111 East Main Street, Suite 300, Richmond, Virginia 23219.

2. Investigation procedure.

A. The department shall notify the business, in writing, that it is the subject of a decertification investigation, explaining the basis for its belief that the business does not meet the eligibility standards for certification.

B. The department may request records or other documentation from the business, may conduct an on-site visit of the business facilities, and may question other parties in its investigation.

C. The department may impose a time limit of not less than 15 days in which the business must respond to a request for records or other documentation. A reasonable extension may be given by the department for good cause shown by the business. Requests for time extensions should be made in writing to the department and should specify the length of time for which the extension is being requested and the reason for the request. If the business fails to provide the information in the time requested, the department shall issue a notice of intent to decertify.

D. Upon completion of the investigation, a written report shall be prepared which shall include:

- i) a statement of the facts leading to the investigation;
- ii) a description of the process followed in the investigation;
- iii) the findings of the investigation; and
- iv) a conclusion which contains a recommendation for disposition of the matter.

3. Notice of intent to decertify.

A. If the department determines that the business does not qualify as a small, women- or minority-owned business, it shall issue a notice of intent to decertify stating the reasons for decertification, providing information compiled in the course of the investigation, requesting a written response from the business, and offering the business the opportunity for an informal hearing under Part IV of this chapter.

DRAFT Administrative Regulations

B. The business shall have 15 days from the date of the department's notification to submit a written request for an informal hearing.

C. If no request for an informal hearing is made, the department shall issue a final notice of decertification, stating the factual and legal grounds therefore and notifying the business of its appeal rights under Part IV of this chapter.

D. The department shall send a copy of the notice of intent to decertify and a copy of the final notice of decertification to the affected business and publish such information to interested agencies or departments.

7VAC10-20-540 Re-application.

A business whose application for certification has been denied may reapply for the same category of certification 12 months after the date on which the business receives the notice of denial, if no appeal is filed, or 12 months after the appeal is exhausted. An applicant denied certification as a women- or minority-owned business may reapply for certification as a small business without delay, if otherwise eligible.

The applicant may request a waiver of the 12-month reapplication period from the department Director by submitting a written request for reconsideration and providing a reasonable basis for the waiver. The director or his designee, in his or her discretion, shall render a final decision regarding the request for reconsideration and waiver within 30 days, which determination shall not constitute a case decision subject to appeal.

Part VII

Procedures for Appeal of Denial of Certification or Decertification

7VAC10-20-600 Appeals from a denial of certification or decertification.

A business shall have the right to appeal a denial of certification or decertification. The appeal process for denial of certification and decertification shall be the same.

7VAC10-20-610 Informal hearing procedure.

A. Any business that has received a notice of intent to deny certification, to deny renewal of certification or to decertify, may submit a written request for an informal hearing. The request shall be received by the department within 15 days of the mailing date of the notification. The request shall set forth the grounds on which the business believes the decision is in error including any additional information which the business has to offer. The written request for an informal hearing shall be submitted to: Informal Hearing Administrator, Virginia Department of Minority Business Enterprise, 1111 East Main Street, Suite 300, Richmond, Virginia 23219.

DRAFT Administrative Regulations

B. The department shall schedule an informal hearing within 30 days of receipt of the request. Written notice of the scheduled hearing date shall be sent to all interested parties at least 10 days prior to the hearing date and shall specify the date, time and location of the hearing. Interested parties shall include all persons who signed the application for certification or certification renewal.

C. The hearing shall be conducted on an informal basis and may be conducted by an informal hearing panel of no more than three (3) panel members designated by the department.

D. The department may, in its case decision, rely upon public data, documents or information and provide copies of such public data, documents or information to the Applicant during the informal fact finding proceeding. The department is not required to provide copies of case law or administrative precedent upon which it relies.

E. New documentation or information submitted at the informal hearing, which was not submitted in the original application and which reflects a change in information upon which the decision to deny certification was based, may be reviewed by the informal hearing committee. The informal hearing committee has the sole discretion to accept or reject any new information and shall provide notice to the applicant in its written notice decision of the acceptance or rejection of such information.

F. Within 30 days of receiving the request for a hearing, the director shall notify the business in writing of the department's final decision.

G. If the final decision is to grant certification, the department shall immediately certify the business. If the final decision is to deny certification or certification renewal, or to decertify, the business shall be notified of the final decision and the reasons therefore. It shall also be notified of its appeal rights.

H. Once the department has made a final decision on certification, recertification or decertification, that determination goes into effect immediately. If a business that has been denied certification or recertification or has been decertified appeals the department's decision, the department's decision remains in effect until the decision is reversed as a result of the appeals process.

7VAC10-20-620 Formal hearing procedure.

Any business which has been denied certification or certification renewal, or which has been decertified by the department may submit a written request for a formal hearing under this chapter.

A. The request shall be received by the department within 15 days of the mailing date of the department's notification. The request shall set forth the grounds on which the business believes the decision is in error, including any additional information which the business has to offer. The written request for a formal hearing shall be submitted to: Formal Hearing Administrator, Virginia Department

DRAFT Administrative Regulations

of Minority Business Enterprise, 1111 East Main Street, Suite 300, Richmond, Virginia 23219

B. The department shall schedule the formal hearing, which shall be presided over by a hearing officer selected from a list prepared by the Executive Secretary of the Supreme Court of Virginia. Written notice of the scheduled hearing shall be sent to all interested parties at least 10 days prior to the hearing date, and shall specify the date, time and location of the hearing. Interested parties shall include all persons who signed the application for certification or certification renewal.

C. The hearing shall be conducted pursuant to the § 2.2-4000 *et seq.* of the *Code of Virginia*, Administrative Process Act. Both the business and the department shall have the right to present evidence, subpoena witnesses and records, and cross-examine witnesses. The firm and the department may be represented by counsel.

D. Following the hearing, the hearing officer shall issue a recommendation to the director, based on findings of fact and conclusions of law.

E. In a case where the hearing office has recommended that the denial of certification be overturned, the director may conduct a subsequent review of the record and issue a final case decision by the department upholding the denial of certification or agreeing with the hearing officer's recommendation. This is the final determination of the department and the Applicant shall be informed of his right to pursue judicial review.

F. The department shall notify the affected business of the final decision regarding certification or decertification in writing.

7VAC10-20-630 Judicial review.

After an applicant has exhausted its administrative remedies and the applicant desires further review, the applicant shall be informed of his right to pursue a judicial review.

7VAC10-20-640 Issues on review by a court.

Further appellate review shall be pursuant to Article V of the Administrative Process Act, § 2.2-4025 *et seq.* of the *Code of Virginia*.

The burden of proof shall be upon the party complaining of the department action to designate and demonstrate an error of law subject to review by the court.